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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JAN 21 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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In the Matter of)	
)	
1997 Annual Access Tariff Filings)	CC Docket No. 97-149
)	CCB/CPD 98-1

AT&T OPPOSITION TO PETITIONS FOR RECONSIDERATION

Pursuant to Section 1.106(g) the Commission's rules, 47 C.F.R. 1.106(g), and its Public Notice, DA 98-16, released January 6, 1998, AT&T Corp. ("AT&T") hereby opposes the petitions for reconsideration filed by Bell Atlantic and the SBC Companies of the Commission's December 1, 1997 Memorandum Opinion and Order, FCC 97-403 ("1997 Annual Access Order") in this docket.

I. THE COMMISSION PROPERLY DETERMINED THAT AN "R" VALUE ADJUSTMENT IS REQUIRED TO REMOVE EQUAL ACCESS AMORTIZATION COSTS FROM THE LECS' PRICE CAP INDICES.

SBC requests the Commission to reverse its ruling in the 1997 Annual Access Order that requires the price cap LECs to make an "R" value adjustment when removing amortized equal access costs from their price cap indices ("PCIs"). SBC contends (at 3) that Commission precedent for the completion of inside wire and depreciation reserve deficiencies, payphone and OPEB cost removals should be followed, and if they are not, the Commission must provide a reasoned analysis as to why it has decided to depart from those rulings. In addition, SBC contends that an "R" value

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adjustment must be adopted in the context of a rulemaking. These claims are frivolous.

Tellingly, what SBC does not and cannot dispute is that an "R" value adjustment is necessary to remove fully the impact of the inclusion of now recovered equal access costs. Thus, SBC is plainly seeking to avoid the very disgorgement of costs that the Commission ordered in the Access Reform Order.¹ In this regard, as the Commission explained:

"Generally, under price cap regulation, a cap is applied to each unit of traffic so that as demand grows the LECs' revenue also grows by the amount of the capped price multiplied by each additional unit of traffic. Since demand has grown, the increase in the PCI incorporated into price caps in 1991 to permit LECs to recover the amortization expense for equal access now permits the LECs to recover a far greater increase in annual revenue than the annual amortization amount specified in 1988. [] Therefore, in order to eliminate fully the impact of the equal access amortization, we must reduce the price cap to a level that will remove from current revenues all revenues attributable to the initial increase in the PCI to reflect the equal access amortization expense. In that way, the current price cap will be set at the same level it would have been had the amortization been completed before the initiation of price cap regulation." 1997 Annual Access Order (para. 110).

Thus, a failure to require an "R" value adjustment would leave embedded in the LECs' PCIs costs which have now been fully recovered.

¹ Access Charge Reform, CC Docket No. 96-262, First Report and Order, FCC 97-158, released May 16, 1997, paras. 302, 314, *pets. for review pending sub nom. Southwestern Bell Tel. Co. v. FCC*, Nos. 97-2618 et al. (8th Cir.).

Contrary to SBC's contentions, the Commission acknowledged the need for and provided a reasoned explanation of why it decided to require an "R" value adjustment in this instance, even though it did not do so with respect to past amortizations. First, as the Commission notes, LEC tariffs making downward exogenous adjustments for inside wire and depreciation reserve deficiency were permitted to take effect without suspension. In those contexts, as well as in the deregulation of LEC payphones, the relevant Commission orders did not specifically consider or address the desirability of an "R" value adjustment. Thus, they are not precedent for the fact that an "R" value adjustment is needed to fully remove equal access costs. 1997 Annual Access Order (para. 117). In the OPEB context, the Bureau declined to require an "R" value adjustment because the Commission had not ordered one, and it felt bound by the Commission's ruling. By contrast, here, the Commission itself determined and explained the need for an "R" value adjustment. It further properly found that its prior orders and the Bureau's action, under delegated authority, do not go to the merits of such an adjustment and are not precedent to the contrary.

Nor is a rulemaking required for the Commission to order an "R" value adjustment. As the 1997 Annual Access Order (para. 119) correctly explains, Section 61.45(d) expressly anticipates that the Commission may provide further guidance as to exogenous adjustments in the form of

a "rule, rule waiver, or declaratory ruling." And it is well established that the Commission may make such rulings either through *ad hoc* litigation or a rulemaking. See, e.g., SEC v. Chenery, 332 U.S. 194, 203 (1947). Again, SBC's procedural contentions are a red herring because all parties had a full opportunity to comment on the merits of an "R" value adjustment in the context of the tariff investigation.

In short, SBC's request for the Commission to reverse itself on how equal access exogenous costs should be removed from its PCI is, at bottom, an attempt to retain revenues which it has already fully recovered. On the merits, the Commission's requirement of an "R" value adjustment is fully justified, and procedurally its ruling is likewise sound. SBC's petition should therefore be denied.

II. BELL ATLANTIC'S ATTEMPT TO AVOID ITS CARRIER COMMON LINE REFUND OBLIGATION IS BASELESS.

Bell Atlantic, on behalf of the former NYNEX companies, contends (at 4, 6) that the 1997 Annual Access Order improperly requires it to refund carrier common line charges ("CCLCs") to interexchange carriers ("IXCs") based on a new method of allocating Common Line costs between IXC and end user customers. Bell Atlantic maintains (at 4) that the effect of this rule is to deny it the ability to recover amounts up to the cap imposed on its revenues in the Common Line basket, instead improperly limiting it to the

difference between the cap and the refund ordered. Bell Atlantic's contentions are meritless and should be rejected.

As the Commission correctly found in the 1997 Annual Access Order (paras. 11-12, 22), accurate base factor portion ("BFP") revenue requirement projections are vital to proper ratemaking because an inappropriately low forecast of per-line BFP revenue requirements reduces the LEC's multiline business ("MLB") end user common line charge ("EUCL") and raises the per-minute CCLC, thus allowing the LEC, in most instances, to earn higher Common Line revenues than the price cap rules would otherwise permit.² Using a three-step statistical analysis, consisting of graph, nonparametric sign and mean tests, the Commission concluded that Bell Atlantic (NYNEX) underestimated its per-line BFP revenue requirement in a statistically significant manner in at least five of the last six years (*id.*, paras. 37, 41, 48) and that it had failed to adequately justify its BFP projections (*id.*, para. 66). On that basis, the Commission quite properly concluded that Bell Atlantic (NYNEX)'s

² Bell Atlantic's claim (at 7) that NYNEX's past underforecasting of BFP revenue requirements has no impact on NYNEX's current total allowable Common Line rates, because its EUCL rates for the last two years were at their cap, is wrong. As AT&T demonstrated in its December 23, 1997 Petition against the price cap LECs' January 1, 1998 tariffs, using U S WEST as an example, LECs' prior underforecasting of BFP revenue requirements allows them to continue to earn higher common line revenues even after EUCL rates reach their caps. *Id.* at 3-6 and Exhibit CCL-Refund.

per-line BFP revenue requirement forecast for 1997/98 is likely to again show a downward bias (*id.*, paras. 66), and prescribed a BFP revenue requirement method, to ensure that Bell Atlantic (NYNEX)'s charges would be "just and reasonable," as required by Section 201(b) of the Communications Act.

As the Commission points out, and which astonishingly Bell Atlantic challenges, in these circumstances, Section 205(a) of the Communications Act expressly empowers the Commission "to determine and prescribe what will be the just and reasonable charge, or the maximum or minimum charge or charges." 1997 Annual Access Order (para. 75). Accordingly, it was entirely proper for the Commission to adopt a prescriptive approach for BFP revenue requirement forecasts for 1997/98 and to require Bell Atlantic to issue refunds to IXCs who, based on its understated BFP forecasts, had paid inflated CCL charges during the July 1, 1997 to December 31, 1997 tariff period. *Id.*, para. 84.

Bell Atlantic contends, however, that the effect of this prescription is to deny it the ability to charge higher MLB EUCLs for that period and that, as a result, its overall Common Line revenues will not be as high as they could otherwise have been. The short answer to this is that by having overcharged one set of ratepayers, namely IXCs, Bell Atlantic is not entitled to recoup its losses from other customers. Offsetting upward adjustments claimed are

not permitted by the Commission's order nor Commission policy.

Indeed, this situation is quite similar to the April 17 Order,³ against which Bell Atlantic also launched a baseless challenge. There the Commission had ordered Bell Atlantic to refund to its customers all amounts, plus interest, collected as a result of overcharges incurred in the Common Line basket during the course of the CC Docket 93-193 investigation. The procedure that the Commission established in the April 17 Order to compute the refund obligation allowed no other outcome but a downward exogenous adjustment. Notwithstanding this fact, Bell Atlantic computed what it believes customers "owe" to it, a procedure which the Bureau rejected.⁴

The Commission also rejected a similar attempt by carriers to offset refund obligations by asserted underpricing in other rates in the 800 Data Access Tariff

³ 1993 Annual Access Tariff Filing etc., CC Docket No. 93-193, Phase I, Part 2 and CC Docket No. 94-65, Memorandum Opinion and Order, FCC 97-139, released April 17, 1997, para. 38 ("April 17 Order").

⁴ *Id.*, Memorandum Opinion and Order, DA 97-1326, released June 25, 1997, paras. 14-18 ("June 25 Order").

Order,⁵ and it should do so here.⁶ As the Bureau acknowledged,⁷ it is "longstanding policy that carriers cannot generally recoup past undercharges by prospective rate increases" (*citations omitted*). This is because, as the Supreme Court has explained, "[t]he company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must . . . shoulder the hazards incident to its actions including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate."⁸

Moreover, a subsequent increase in other rates would be prohibited retroactive ratemaking. When the Commission treats a rate as interim in nature and subject to

⁵ 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Service, CC Docket Nos. 93-129 and 86-10, Order on Reconsideration, FCC 97-135, released April 14, 1997, paras. 13-17 ("800 Data Base Access Tariff Order").

⁶ See also Federal Power Commission v. Tennessee Gas Transmission Co., 371 U.S. 145, 152 (1962) ("Tennessee Gas"); Belco Petroleum v. FERC, 589 F.2d 680, 687 (D.C. Cir. 1978) (prohibiting retroactive rate increases); Thornell Barnes Co. v. Illinois Bell Telephone Co., 1 F.C.C.2d 1247 (1965); MCI Telecommunications Corp. v. FCC, 59 F.3d 1407, 1419 (D.C. Cir. 1995) (no authority to order offsets to undercharges in a complaint proceeding); 800 Data Access Tariff Order, para. 17 and n.44; American Television Relay Inc., 67 F.C.C.2d 703 (1978) (offsets prohibited in tariff investigations).

⁷ June 25 Order, para. 15.

⁸ Tennessee Gas, 371 U.S. at 153.

"true-up" it does so explicitly,⁹ and there was no such FCC action here.

Accordingly, Bell Atlantic (NYNEX)'s repeated forecasting errors should not result in unwarranted rate increases on end user customers. Indeed, if Bell Atlantic has undercharged its end user customers due to its systemic BFP forecasting errors, it was a voluntary business decision, and Bell Atlantic cannot claim that customers "owe" it. Bell Atlantic is not guaranteed revenues up to its full Common Line basket PCI. By having systemically biased BFP projections that resulted in overstated CCL rates, it assumed the risk that, as the Commission quite properly ordered, it would be required to make refunds to IXCs without any ability to increase its EUCL rates to end users.

⁹ See Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection for Special Access, 8 FCC Rcd. 8344, 8360 (1993); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No 96-98, First Report and Order, FCC 96-325, released August 8, 1996, para. 1067.

Wherefore, the Commission should deny the
Petitions for Reconsideration filed by SBC and Bell Atlantic
of the 1997 Annual Access Order.

Respectfully submitted,

AT&T CORP.

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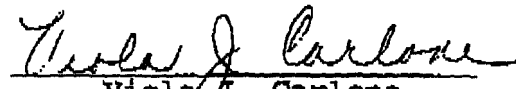
CERTIFICATE OF SERVICE

I, Viola J. Carlone, do hereby certify that on this 21st day of January, 1998, a copy of the foregoing "AT&T Opposition to Petitions for Reconsideration" was served by U.S. first class mail, postage prepaid, to the parties listed below.

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